90-8 660

No. 90-________

In the

Supreme Court of the United States

October Term, 1990

STANLEY KASAL, GEORGE RUZICKA d/b/a RUZICKA BROTHERS, OATHER MARTIN, SR. and FRANCIS KASAL,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate Capacity as Liquidator of CITIZENS STATE BANK OF GIBBON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDIX

CURTIN AND BARNES
CHRISTINE L. MEUERS
(Counsel of Record)
2112 Plaza VII
45 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 337-5445

Attorneys for Petitioners

1990 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
FAX 612-337-8053

QUESTIONS PRESENTED

1. Whether the doctrine enumerated by this Court in *D'Oench Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S.Ct. 676 (1942) and codified in 12 U.S.C. §1823(e) precludes a borrower of a failed despository institution from raising the defense of payment of the borrower's indebtedness against the Federal Deposit Insurance Corporation.
2. Whether a bank customer's reasonable expectation that payments on account will be credited properly when made is an "agreement" under 12 U.S.C. §1823(e).

PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Federal District Court Decisions

STATUTES AND RULES

OTHER AUTHORITIES

No. 90-________

In the

Supreme Court of the United States

October Term, 1990

STANLEY KASAL, GEORGE RUZICKA d/b/a RUZICKA BROTHERS, OATHER MARTIN, SR. and FRANCIS KASAL,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Corporate Capacity as Liquidator of CITIZENS STATE BANK OF GIBBON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") entered on August 31, 1990.

OPINIONS BELOW

The trial court's Order (A-2) granting the Federal Deposit Insurance Corporation's ("FDIC'S") motions for summary judgment is unreported. The Opinion (B-1) of the panel of the Eighth Circuit is at 913 F. 2d 487 (8th Cir. 1990).

JURISDICTION

The decision of the Eighth Circuit in this case was entered August 31, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17 of this Court's Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

12 U.S.C. §1823(e) (1989) provides as follows:

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or Section 11, either as security for a loan or by purchase or as a receiver of any insured depository institution, shall be valid against the Corporation unless such agreement — (1) is in writing, (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) has been continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

This matter was originally commenced as separate actions in Minnesota state district court in July 1987 by the Citizens State Bank of Gibbon ("the Bank") against Petitioners and others to collect principal and interest allegedly due and owing on certain promissory notes. Petitioners interposed numerous affirmative defenses that included, among others, lack of consideration, fraud in the inducement, accord and satisfaction and payment. Approximately nine months later, on March 18, 1988, the Bank was declared insolvent and the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver.

The FDIC in its receiver capacity subsequently entered into a transfer and assumption agreement with the Minnesota Valley Bank of Redwood Falls, Minnesota wherein the FDIC sold all loans of the Bank, with the exception of those over thirty days past due. The remaining assets, including Petitioners' notes, were sold to the FDIC in its corporate capacity ("FDIC-Corporate").

The FDIC-Corporate unsuccessfully moved to substitute itself as plaintiff in the state court collection actions, but was ultimately successful in intervening as a party. It then removed the actions to Federal District Court for the District of Minnesota and moved for summary judgment.

On July 14, 1989, the district court entered its order granting the FDIC's motions for summary judgment against each Petitioner. Petitioners filed a joint appeal to the Eighth Circuit Court of Appeals. A three judge panel affirmed the district court's order, with one judge dissenting.

REASON FOR GRANTING THE WRIT

For more than a decade, the large number of bank failures in this country has inundated the federal courts with lawsuits between the banking regulatory agencies and borrowers of insolvent financial institutions, whose loans the agencies are seeking to collect. *See, e.g.*,

Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurers When Banks Fail 62 S. Cal. L. Rev. 253, 258-9 (1988). Traditionally, both federal common law and the Federal Deposit Insurance Act have given the FDIC broad protection from the defenses that might have otherwise been available to a borrower had the financial institution remained solvent or commenced the legal action. *See D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447, 62 S. Ct. 676 (1942); 12 U.S.C. §1823(e).

The FDIC's immunity from defenses has been extended recently to the FDIC in its capacity as receiver of any insured depository institution. *See* 12 U.S.C. §1823(e), as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").[1] Some courts have also granted the Federal Savings & Loan Insurance Corporation ("FSLIC") the power to invoke the protections of *D'Oench* and §1823(e)[2].

In *D'Oench,* this Court established a federal common-law doctrine of estoppel barring a debtor from raising a so-called "side-agreement" with a failed bank as a defense to defeat the FDIC's recovery against the debtor. Congress codified this doctrine in 12 U.S.C. § 1823(e) which specifically prohibits defenses based on "agreements" between borrowers and lenders that do not meet the statutory criteria. Thus, several contract defenses have been held not to survive the *D'Oench*

---

[1]Pub. L. No. 101-73, 103 Stat. 183 (1989)

[2]*See FSLIC v. Two Rivers Assocs. Inc.,* 880 F. 2d 1267 (11th Cir. 1989); *Mainland Savings Ass'n v. Riverfront Assoc., Ltd.* 872 F. 2d 955 (10th Cir.), *cert. denied,* 110 S. Ct. 235 (1989); *Firstsouth, F.A. v Aqua Construction, Inc., et al,* 858 F. 2d 441 (8th Cir. 1988); *FSLIC v. LaFayette Investment Properties Inc.,* 855 F. 2d 196 (5th Cir. 1988); *Andew D. Taylor Trust v. Security Trust Federal Savings & Loan Association,* 844 F. 2d 337 (6th Cir. 1988).

estoppel doctrine and §1823(e)[3]; however, other defenses and legal theories have been held to fall outside the scope of the "secret side agreement" upon which the *D'Oench* doctrine and §1823(e) are based.[4].

What constitutes an "agreement" under §1823(e) was the subject of this Court's decision in *Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396 (1987). In *Langley*, the issue arose in the context of the borrowers' defense of fraudulent misrepresentation concerning the FDIC's attempt to recover on a note acquired from a failed financial institution. Justice Scalia, writing for a unanimous Court, held that "agreement" should have a "common" meaning, similar to that under commercial or contract law, that is broader than a mere "promise" and that embraces any conditions upon performance of the contract. 484 U.S. at 91. This Court held that the representations alleged by the borrowers were "agreements" under §1823(e) and that the FDIC had acquired a "title or interest" in the note because those representations, even if fraudulent, rendered the note voidable rather than void. 484 U.S. at 93-94.

---

[3] *See, e.g. Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396 (1987) (fraud in the inducement); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676 (1942) (failure of consideration); *FDIC v. Cardinal Oil Well Servicing Co., Inc.*, 837 F. 2d 1369 (5th Cir. 1988) (fraudulent misrepresentation); *FDIC v. McClanahan*, 795 F. 2d 512 (5th Cir. 1986) (failure of consideration). *See also Mery v. Universal Savings Assn.*. 737 F.Supp 1000, 1004 (S.D.Tex. 1990) (listing barred defenses)

[4] *See, e.g., Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396 (1987) (fraud in the factum); *FDIC v. State Bank of Virden*, 893 F. 2d 139 (7th Cir. 1990) (set-off not dependent upon oral statements contradicting documents); *Commerce Federal Sav. Bank v. FDIC*, 872 F. 2d 1240 (6th Cir. 1989) (§1823(e) "agreement" applied only to action or defense anchored in agreement separate and collateral from the instrument FDIC is seeking to protect); *Grubb v. FDIC*, 868 F. 2d 1151 (10th Cir. 1989) (notes voided by judgment before FDIC acquired bank assets); *FDIC v. Blue Rock Shopping Center*, 766 F. 2d 744 (3rd Cir. 1985) (impermissible impairment of collateral); *FDIC v. Harrison*, 735 F. 2d 408 (11th Cir. 1984) (equitable estoppel); *Howell v. Continental Credit Corp.*, 655 F. 2d 743 (7th Cir. 1981) (defenses arising out of bilateral obligations of lease agreement); *FDIC v. Nemecek*, 641 F.Supp 740 (D.Kan. 1986) (settlement cancelling note before acquisition by FDIC).

Langley is the first opinion of this Court since *D'Oench* to address the estoppel doctrine and this Court's only decision interpreting §1823(e). *Langley's* broad construction of the term "agreement" has been utilized by lower courts not only to bar the fraudulent inducement defense addressed in *Langley*, but also to summarily dismiss defenses that do not necessarily rest upon "secret side agreements".[5]

The Eighth Circuit opinion below is a case in point. The majority panel's decision is premised on the assumption that a bank officer's obligation to credit payments made on account was part of a "secret side agreement." The Eighth Circuit framed the issue as follows:

> Appellants now contend only that the FDIC cannot recover the full amount of the notes because Kasal made numerous payments, *pursuant to their secret unwritten side agreements*, intended to be applied to appellants that were later misappropriated by Albertson . . .
>
> We hold that §1823(e) bars appellants from raising any aspect of their *secret side agreements with the Bank* as a defense to the FDIC's claims on the notes.

(B-6) (Emphasis added.)

A side agreement concerning Petitioners' *liability* on the notes is an issue separate and distinct from *what is due* on the notes. As Judge Heaney noted in his dissent:

> The thrust of *Langley* is that only those who participate in the secret scheme or arrangement are to be prejudiced. Nothing in *Langley* requires that bank customers, rather than the bank or the FDIC, should bear the loss if a bank officer or employee misappropriates funds from a customer.

(B-16). The Eighth Circuit's failure to recognize this

[5] *See, e.g., FDIC v. Krause*, 904 F. 2d 463 (8th Cir. 1990) (accord and satisfaction); *Templin v. Weisgram*, 867 F. 2d 240 (5th Cir.), *cert. denied*, 110 S. Ct. 63 (1989) (invalidity of transaction under state law); *FDIC v. Manat*, 688 F. Supp. 1327 (E.D. Ark. 1988) (accord and satisfaction).

distinction is at odds with holdings in the First and Sixth Circuits. *FDIC v. Bracero and Rivera, Inc.*, 895 F. 2d 824 (1st Cir. 1990); *Commerce Federal Saving Bank v. FDIC*, 872 F. 2d 1240 (6th Cir. 1989). In both *Bracero* and *Commerce*, the estoppel doctrine of §1823(e) was held to be inapplicable to payment-related defenses.

In *Bracero*, the FDIC had actual notice of the cancellation of the principal debt of appellee, but tried to enforce a note and mortgage pledged by another party against appellee. The FDIC argued that the mortgage note was never properly cancelled, leaving the appellee liable. 895 F. 2d at 827. It also argued that in neglecting to retrieve the paid mortgage note from the Bank, appellee "lent itself to an unwritten agreement or scheme likely to mislead the FDIC"; under §1823(e) appellee was estopped from defending on the grounds the mortgage note was cancelled. 895 F. 2d at 829.

The First Circuit rejected these arguments, upholding the district court's ruling that there was no "secret" agreement between appellee and the Bank; rather, any failure to retrieve the note was based on "good-faith" neglect. *Id.* It also held that even if a secret agreement between the appellee and the Bank could be construed from the facts, acts independent of the alleged agreement invalidated the note. Consequently, payment discharged the note and cancelled the underlying debt *before* the FDIC obtained it. 895 F. 2d at 830.

In *Commerce*, the Sixth Circuit adopted a similar position in the context of a borrower's assertion of full payment and satisfaction of indebtedness secured by a deed of trust. There, the FDIC argued successfully at the district court level that cancellation of a deed of trust was dependent upon an oral side agreement barred under §1823(e). The Sixth Circuit reversed, interpreting "agreement" under §1823(e) to apply "only to an action or defense which is anchored in an agreement separate and collateral from the instrument which the FDIC is seeking to protect." 872 F. 2d at 1244. Because the appellant had satisfied all outstanding indebtedness secured by the deed of trust, the security was extinguished as a matter of law and the FDIC had not

acquired the deed of trust as an asset. *Id.* at 1245.

Previously, this Court granted a Writ of Certiorari to resolve a conflict between the Eleventh and Sixth Circuit Courts of Appeals' interpretations of § 1823(e). *Langley v. FDIC,* 484 U.S. at 88.[6] The conflict between the Eleventh and Sixth Circuits, on the one hand, and the Eighth Circuit, on the other, with respect to payment-related defenses is as significant as that between *Gunter* and *Hatmaker.*[7] This conflict can be resolved only through this Court's interpretation of § 1823(e) and resolution of an issue that *Langley* left unaddressed.

Not only is the conflict irreconcilable, but it also involves an important matter of statutory construction that will impact the orderly administration of the Federal Deposit Insurance Act., as amended by FIRREA. If a borrower's expectation that payments will be properly credited to reduce liability on a note can be thwarted by the federal banking agencies' invocation of § 1823(e), then this Court should enunciate that premise to avoid further litigation on the issue. In a parallel circumstance, this Court granted certiorari to resolve a matter of "considerable practical importance" in the administration of the Bankruptcy Act.[8]

---

[6] Conflict between *Gunter v. Hutcheson,* 674 F. 2d 862 (11th Cir.), *cert. denied,* 459 U.S. 826, 103 S. Ct. 60 (1982) (defense of fraudulent inducement not barred by 12 U.S.C. §1823(e)) and *FDIC v. Hatmaker,* 756 F. 2d 34 (6th Cir. 1985) (fraud defenses barred by 12 U.S.C. §1823(e)).

[7] *See United Brotherhood of Carpenters & Joiners of America v. U.S.,* 330 U.S. 395, 400, 67 S. Ct. 775 (1946) ("On account of the importance of the federal questions raised and asserted conflicts in the circuits, the writs of certiorari were granted.")

[8] *See City of New York v. Saper,* 336 U.S. 328, 329, 69 S. Ct. 554 (1949).

CONCLUSION

This Court should grant Petitioner's Writ in this case to clarify federal banking law as it has evolved with respect to the estoppel doctrine of 12 U.S.C. §1823(e) and *D'Oench.* This Court should address what defenses survive against the FDIC. Specifically, the conflict in the courts of appeals in interpreting what constitutes an "agreement" for purposes of determining whether a borrower's defense of payment is cognizable against the FDIC must be resolved. This Court's decision in *Langley* requires further clarification given the fact that cases in the lower courts are pending on this issue. *See Massachusetts Trustees v. United States,* 377 U.S. 235, 237, 84 S. Ct. 1236 (1963).[9]

Dated: November 28, 1990

Respectfully submitted,

CURTIN AND BARNES
Christine L. Meuers,
(Counsel of Record)
2112 Plaza VII
45 South 7th Street
Minneapolis, Minnesota 55402
Telephone: (612) 337-5445

Attorneys for Petitioners

Of Counsel:

Pete Kasal
KEEFE AND KASAL
246 Main Street South
Post Office Box 220
Hutchinson, Minnesota 55350

---

[9] *See, e.g., FDIC v. Byrne,* 736 F. Supp. 727, 733, n. 9 (N.D. Tex. 1990) (Since parties had not sought summary judgment on the note, Court not deciding validity of defense that the note had been paid or viability of counterclaim for overpayments).

APPENDIX TABLE OF CONTENTS

United States District Court
District of Minnesota
Fourth Division

ORDER

Federal Deposit Insurance Corporation,
Plaintiff,
v.
Stanley Kasal,
Defendant.

CIVIL 4-88-960

Federal Deposit Insurance Corporation,
Plaintiff,
v.
Oather Martin Jr.,
Defendant.

CIVIL 4-88-961

Federal Deposit Insurance Corporation,
Plaintiff,
v.
Peter Kasal,
Defendant.

CIVIL 4-88-963

Federal Deposit Insurance Corporation,
Plaintiff,
v.
John D. Schilling,
Defendant.

CIVIL 4-88-964

Federal Deposit Insurance
Corporation,
Plaintiff, CIVIL 4-88-1058
v.

George Ruzicka, d/b/a,
Ruzicka Brothers,
Defendant.

Federal Deposit Insurance
Corporation,
Plaintiff, CIVIL 4-88-1063
v.

Grant G. Knutson a/k/a,
Grant Knutson,
Defendant.

Federal Deposit Insurance
Corporation,
Plaintiff, CIVIL 4-88-1065
v.

Oather Martin, Sr.,
Defendant.

Federal Deposit Insurance
Corporation,
Plaintiff, CIVIL 4-88-1069
v.

Francis Kasal,
Defendant.

Brian E. Palmer, Christopher J. Riley, Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, MN 55042; Paul J. Jeddeloh, 501 East Highway 13, P.O. Box 1336 Burnsville, MN 55337, for plaintiff Federal Deposit Insurance Corporation.

John E. Keefe, Peter Kasal, Keefe & Kasal, 246 Main Street South, Hutchinson, MN 55350, for defendants Stanley Kasal, Oather Martin, Jr., Peter Kasal, George Ruzicka, Oather Martin, Sr., and Francis Kasal.

Christine L. Meuers, Curtin & Barnes, 2112 Plaza VII, 45 South Seventh Street, Minneapolis, MN 55402, for defendants John D. Schilling and Grant G. Knutson.

This matter is before the Court on plaintiff's motions for summary judgment on its claims against defendants and to dismiss defendants' counterclaims for failure to state a claim. Plaintiff's motions will be granted.

FACTS

In these eight related actions, the Federal Deposit Insurance Corporation (FDIC), in its corporate capacity, seeks to recover on promissory notes executed by defendants in favor of the Citizens State Bank of Gibbon (the bank). Each of the defendants defaulted on their obligations on the notes. The bank originally commenced these actions in state court. On or about March 18, 1988, the Commissioner of Commerce for the State of Minnesota determined that the bank was insolvent. The commissioner ordered the bank closed and appointed the FDIC as receiver for the bank.

The FDIC, in its capacity as receiver, sold certain assets of the bank, including the notes at issue herein, to the FDIC in its corporate capacity pursuant to 12 U.S.C. § 1823(c) (2) (A). The FDIC in its corporate capacity then moved to be substituted for the bank as the real party in interest in each of these cases. These motions were denied by the Sibley County District Court. The court, however, permitted the FDIC in its corporate capacity to intervene as a party plaintiff in each of the suits. The FDIC as intervenor then removed each of these cases to federal district court pursuant to 12 U.S.C. § 1819 and 28 U.S.C. § 1446.

The factual circumstances surrounding defendants' execution of the notes at issue herein are related. Defendant Francis Kasal was a longtime customer and depositor of the bank. In the course of his dealings with the bank, Francis Kasal developed a close personal and business relationship with the bank's president, Dennis K. Albertson. During the period 1965 through 1986, Francis Kasal executed and repaid dozens of loans with the bank in amounts totaling several million dollars. A pattern of repayment of these loans developed over the years whereby the bank would issue general debits against the checking account of Francis Kasal and use the proceeds to apply to Francis Kasal's notes. Francis Kasal was repeatedly assured by Albertson that debits on Kasal's checking account were properly applied to his obligations. Further, Francis Kasal normally made all deposits to his accounts directly through Albertson

and relied on Albertson to deposit the funds in Kasal's account.

From 1980 through 1986, Francis Kasal signed numerous loans with the bank; as many as fifteen separate loans were in existence at one time. In 1983, 1984 and 1985, Francis Kasal was advised by Albertson that he was over the lending limit with the bank. Francis Kasal was further advised by Albertson that the bank could loan additional amounts to Kasal if he could obtain the signatures of friends or relatives on the notes. Thereafter, with the advice and encouragement of Albertson, Francis Kasal obtained the signatures of defendants Stanley Kasal, Oather Martin, Jr., Peter Kasal, John D. Schilling, George Ruzicka, Grant Knutson and Oather Martin, Sr. on various notes. Upon signing the notes, each of these defendants were told that they would not be required to repay the loan, but that the bank would look solely to Francis Kasal for repayment of the notes. Certain of the defendants were similarly induced to execute notes on behalf of Albertson.

The FDIC's complaint in intervention filed in these cases is straightforward. The FDIC alleges that defendants executed various notes in favor of the bank which notes the FDIC now owns. The FDIC further alleges that defendants have defaulted on the notes. The FDIC thus seeks to collect on the notes and to foreclose on any property given as security for the notes. In responding to the FDIC's complaint in intervention, defendants assert numerous affirmative defenses to liability on the notes and further assert counterclaims against the FDIC in its corporate capacity.[1]

[1] In their original answers to the complaint filed by the bank in the state court actions, defendants asserted counterclaims against the bank for breach of contract, negligence, promissory estoppel and misrepresentation. Certain defendants further asserted claims for violation of Minn. Stat. § 549.21, subd. 2 and for punitive damages.

The FDIC now moves the Court for summary judgment on the notes executed by defendants.[2] The FDIC further

[2]The amounts sought by the FDIC from defendants on the various loans at issue in these cases are:

Defendant	Count	Outstanding Principal	Accrued Interest as of 2/10/89	Daily Interest Accrual
Stanley Kasal CIVIL 4-88-960	I	$ 28,497.33	$ 16,312.94	$ 12.10
Oather Martin, Jr. CIVIL 4-88-961	I	28,000.00	16,813.01	11.89
Peter Kasal CIVIL 4-88-961	I	43,513.05	21,687.37	19.07
	II	20,000.00	10,268.20	8.49
	III	10,000.00	4,865.74	4.11
	IV	63,600.00	22,206.44	25.27
	V	60,000.00	35,634.22	23.84
	VI	10,000.00	4,866.24	4.11
	VII	—0—	—0—	—0—
John D. Schilling CIVIL 4-88-964	I	50,000.00	26,390.19	21.23
George Ruzicka d/b/a Ruzicka Brothers CIVIL 4-88-1058	I	221,451.83	64,253.09	84.94
Grant G. Knutson aka Grant Knutson CIVIL 4-88-1063	I	50,000.00	25,561.58	20.55

Oather Martin, Sr. CIVIL 4-88-1065	I	77,368.69	43,459.97	30.74
Francis Kasal CIVIL 4-88-1069	I	90,079.31	42,369.32	35.78
	II	80,000.00	39,645.45	31.78
	III	13,626.80	6,409.44	5.41
	IV	14,500.00	6,820.15	5.76
	V	50,000.00	23,517.79	19.86
	VI	35,000.00	16,462.45	13.90
	VII	30,000.00	14,110.67	11.92
	VIII	40,000.00	18,814.23	15.89
	IX	35,510.71	17,125.87	14.11
	X	2,900.00	1,458.10	1.23
	XI	4,714.63	2,370.48	2.00
	XII	19,500.00	9,804.48	8.28
	XIII	45,200.00	25,048.81	19.19
	XIV	8,700.00	4,773.31	3.69
	XV	31,740.79	13,381.11	11.30

seeks dismissal of all the counterclaims asserted by defendants against the bank and the FDIC. The FDIC's motions originally were scheduled to be heard on March 8, 1989. Upon defendants' request, however, that date was extended to May 23, 1989 allow time for further discovery.

DISCUSSION

I. *Motion for Summary Judgment*

The FDIC moves the Court for summary judgment on its claims against defendants. The FDIC contends that defendants' affirmative defenses are insufficient as a matter of law to defeat the FDIC's claims, and further alleges that no genuine issues of material fact exist which would preclude summary judgment.

A movant is not entitled to summary judgment unless the movant can show than no genuine issue exists as to any material fact. Fed.R.Civ.P. 56(c). In considering a summary judgment motion, a court must determine whether there are any genuine factual issues that properly can be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. *AgriStor Leasing v. Farrow*, 826 F2d 732, 734 (8th Cir. 1987). In making this determination, the Court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences that can be drawn from the facts. *AgriStor Leasing*, 826 F.2d at 734. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed.R.Civ.P. 56(c), then the nonmoving party may not merely rest upon the allegations or denials of the party's pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824, F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 707 (1988). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

A. ***Validity of Affirmative Defenses***

Athough originally defendants asserted numerous affirmative defenses to their liability on the notes, defendants now assert only two defenses. First, all defendants contend that the FDIC cannot recover the full amount of the notes in question because numerous payments were made which were to be applied and credited to the indebtedness evidenced by the notes but which were misappropriated and not so applied. Second, defendants Schilling and Knutson assert that their signatures were procured on documents without the defendants having knowledge of the true contents of the documents. Accordingly, these defendants assert that the obligations underlying those documents are void and unenforceable.

1. ***Payment***

Defendants contend that they are not liable for the full amount of the notes in question because numerous payments have been made reducing the amount owing on the notes. In support of their contention, defendants submit the affidavit testimony of defendants Francis Kasal, Peter Kasal and George Ruzicka who aver that several payments were made toward the notes in question which were not applied to reduce the amount of the loan. *See* Affidavit of Francis Kasal par. 12; Affidavit of Peter Kasal par. 6; Affidavit of George Ruzicka par. 6. Defendants contend that payment is a valid defense to the obligations which the FDIC seeks to enforce. The FDIC argues that defendants' payment defense is barred by 12 U.S.C. § 1823(e) and the *D'Oench Duhme* doctrine. In *D'Oench, Duhme & Co., v. FDIC,* 315 U.S. 447 (1942), the FDIC had acquired a note executed by the defendant in favor of a bank which ultimately failed. The defendant previously had sold the bank certain bonds which later defaulted. The defendant executed the note in issue to enable the bank to carry the note, instead of the past due bonds, as an asset on its books. The defendant and the

bank agreed that the proceeds of the bonds would be credited to the note. Further, the parties agreed that the note itself would not be called for payment.

When the FDIC brought suit on the note, the defendant contended that the FDIC could not recover because the note was given without any consideration and because the parties had agreed that the note would not be collected. The Supreme Court held that defendant could not escape liability on the note based on its asserted defenses. The Court recognized a federal policy of protecting the FDIC against misrepresentations as to the assets of the banks which it insured. The Court held that the defendant, having given a note to the bank with the secret agreement that it would not be enforced, was presumed to know that the presence of the note in the bank records would tend to deceive the FDIC and other bank examiners. Specifically, the Court found that defendant had "lent himself to a scheme or arrangement whereby the [FDIC] was or was likely to be misled." *D'Oench, Duhme*, 315 U.S. at 460. Accordingly, the Court held that defendant was estopped from asserting lack of consideration or the party's secret agreement as defenses to liability on the note.

Numerous court have applied the *D'Oench, Duhme* doctrine to defeat defenses to recovery by the FDIC of obligations owed failed banks. *See Norcross*, 103 Bank.L.J. 316, 332 n.72 (citing cases); *see also FDIC v. R-C Marketing and Leasing, Inc.*, CIVIL 4-88-889 (D.Minn. June 23, 1989) [1989 WL 68843]. Further, the bar to defenses relating to secret agreements was codified by Congree in 1950 with the enactment of 12 U.S.C. § 1823(e) which provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall

> have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, and official record of the bank.

The FDIC contends that defendants' defense of payment is barred by section 1823(e) and the *D'Oench, Duhme* doctrine because it relates to the defendants' oral side agreement with Albertson and the bank. Except for defendant Francis Kasal, defendants executed the notes while not intending to be bound to repay these obligations. Defendants relied on Albertson's assurances that the bank would look only to Francis Kasal for repayment of the notes, and that Kasal's payments would be applied to reduce the outstanding balance of the notes. The FDIC contends that in asserting the defense of payment, defendants are in essence seeking to enforce this collateral oral agreement against the FDIC; defendants complain that Albertson failed to honor his representation to apply Kasal's payments to the notes. The FDIC argues, however, that the parties' collateral agreement is unenforceable under section 1823(e) as it fails to meet the formal requirments enumerated therein. Thus, the FDIC contends that defendants' payment defense is barred.

The FDIC also argues that defendants' payment defense is barred because, pursuant to the policies underlying section 1823(e) and the *D'Oench, Duhme* doctrine, the FDIC must be allowed to rely on the records of a failed bank. Here, defendants signed facially valid notes that in no way suggest that defendants themselves are not subject to liability for repayment. Further, the bank's records do not reflect the alleged payments. Accordingly, the FDIC argues that is should be able to recover the outstanding amount of the notes as reflected in the records.

In opposition to the FDIC's argument, defendants contend that their payment defense is not barred because, rather than arising out of an undisclosed side agreement prohibited by section 1823(e), the defense arises out of the very same agreement the FDIC is attempting to enforce. Defendants

contend that implicit in the agreement of a maker of a note to pay according to its terms is the corresponding agreement of the lender to properly credit and apply loan payments. Defendants thus argue that the FDIC is subject to the defense of payment.

As support for their contentions, defendants rely principally on *Riverside Park Realty Company v. FDIC*, 465 F.Supp. 305 (M.D.Tenn. 1978). In *Riverside Realty*, the FDIC sought to foreclose on a deed of trust on real property and the plaintiffs sued to enjoin the foreclosure. Plaintiffs argued tha the FDIC's assignors, the mortgage company and a bank, breached the loan agreement. The FDIC contended, citing 12 U.S.C. § 1823(e), that the plaintiffs could not raise the breach of the loan agreement as a defense. The court held that section 1823(e) does not apply in a situation where the terms of the agreement tending to diminish the rights of the FDIC appear in writing on the face of the agreement that the FDIC sought to enforce. *Riverside Realty*, 465 F.Supp. at 313.

Defendants argue that, as in *Riverside Realty*, the defense at issue here arises out of the face of the notes. Defendants contend that no collateral agreement is relied upon for the assertion of the payment defense; section 1823(e) thus is inapplicable. Defendants thus argue that payment is a valid defense in this case.

The Court finds the holding in *Riverside Realty* to be inapposite in this case; accordingly, defendants' defense of payment will be barred. In *Riverside Realty*, the debtor did not enter a sham transaction, executing an obligation it did not intend to honor. Here, however, defendants entered just such a transaction. Defendants executed notes that on their face bound defendants to pay, yet defendants relied on oral assurances from Albertson that they would not be looked to for payment. Defendants thus clearly entered into an agreement tending to diminish the FDIC's interest in the notes in contravention of section 1823(e).

The Court finds that defendants should not be allowed to enter into a deceitful agreement and then complain that it was not upheld. As the Supreme Court noted in *Langley v.*

FDIC, 108 S.Ct. 396, 402 (1987):

> [O]ne who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench Duhme*) or of the truthfulness of a warranted fact.

While perhaps some unfairness results to defendants in that they do not receive the benefit of certain alleged payments, the interests of the FDIC as protected by section 1823(e) and the *D'Oench, Duhme* doctrine are overrriding.[3]

Based on the foregoing, the Court finds that defendants' defense of payment is barred in this case.

2. Fraud in the Factum

Defendants Knutson and Schilling contend that material questions of fact exist regarding whether these defendants were victims of fraud in the factum. In his affidavit, defendant Knutson states that he signed an extension agreement that was blank. Affidavit of Grant G. Knutson par. 5. Defendant Schilling stated at his deposition that he did not recall signing a loan extension agreement. Deposition of John Schilling at 21. Based on this testimony, defendants argue that they were victims of fraud in the factum.

In *Langley v. FDIC*, 108 S.Ct. 396, 402 (1987), the Supreme Court, in dicta, suggested that the defense of fraud in the factum would take an instrument out of the coverage of section 1823(e). The Court reasoned that such a defense would render an obligation entirely void, thus leaving no "'right, title or interest' that could be 'diminish[ed] or

---

[3]The extreme negligence of defendant Francis Kasal in monitoring his financial transactions supports the above result. It seems clear that had Kasal even occasionally checked the balance of his outstanding debts, or obtained some record of fund transfers, that he could have prevented at least part of the loss suffered here. Instead, by failing to take any steps to account for his payments, Kasal clearly "lent himself to a scheme or arrangement" whereby the FDIC was likely to be misled. *See FDIC v. McClanahan*, 795 F.2d 512, 516-17 (5th Cir. 1986).

defeat[ed].'" *Langley,* 108 S.Ct. at 402, *quoting* 12 U.S.C. § 1823(e). Fraud in the factum is the type of fraud that procures a party's signature to a document without knowledge of its true nature or contents. *Langley,* 108 S.Ct. at 402, *citing* Uniform Commercial Code § 3-305(2) (c), Comment 7, 2 U.L.A. 241 (1977). "'The test of the defense [of fraud in the factum] is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge.'" *FDIC v. Culver,* 640 F.Supp. 725, 729 (D.Kan. 1986), *quoting* U.C.C. § 3-305(2) (c), Comment 7.

The Court finds the testimony cited by defendants Knutson and Schilling to be wholly insufficient to preclude entry of summary judgment in favor of the FDIC on the defense of fraud in the factum. Defendants do not affirmatively state that they were ignorant of the true nature of the documents bearing their signature, nor do they allege that they had no reasonable opportunity to discover the contents of the documents. In short, even accepting defendants' statements as true, defendants have failed to establish a prima facie case of fraud in the factum.[4] Accordingly, the Court finds that defendants' defense of fraud in the factum is barred as a matter of law.

B. *Amount of Indebtedness*

In opposing the FDIC's motion for summary judgment, with the exception of asserting the validity of their affirmative defenses, defendants do not dispute their liability on the notes. That is, defendants do not argue that the notes are not in default or that demand for payment has not been made. Defendants Schilling and Knutson argue, however, that the documentation submitted by the FDIC in support of its motion for summary judgment does not conclusively establish the amount of those defendant's liability. Defendants argue that the FDIC's documentation does not establish the amount of defendants' liability as a matter of

---

[4] As the parties asserting the affirmative defense of fraud in the factum, defendants bear the burden of proving the defense.

law, and that material questions of fact exist regarding the amount of indebtedness.

In support of their argument, defendants cite what they characterize as inconsistencies in the bank's records which cast doubt on the amount due on defendants' notes. Defendant Schilling observes that while the affidavit of Patrick Mach and accompanying exhibits submitted by the FDIC reflect an unpaid principal balance on defendant Schilling's note of $50,000, other documents discovered by defendants show that as of September 30, 1987, Schilling's unpaid balance was zero. *Compare* Affidavit of Patrick Mach par. 4 and Exh. 6 *with* Affidavit of Christine Meuers (May 15, 1989) App. 2 In fact, defendant Schilling points out that the bank records show that Schilling's note was "participated" out to the State Bank of Morgan. Schilling argues that this inconsistent treatment of his note renders suspect the FDIC's proof of the amount of Schilling's liability.

The Court finds that the above-described inconsistency is insufficient to create a genuine issue of fact as to Schilling's liability. The FDIC correctly points out that bookkeeping entries which reflect participation of the loan do not reduce the defendant's obligation on the promissory note. Defendant Schilling does not argue that the participation affects the amount of his liability. Further, defendant Schilling does not point to records showing some miscalculation of interest or principal. Accordingly, the alleged inconsistency cited by defendant Schilling does not raise a fact issue as to the amount of Schilling's liability.

With respect to his alleged liability, defendant Knutson contends that bank documents show activity in Knutson's loan account which is not reflected in Mach's affidavit. *See* Meuers Aff. App. 6. Through the affidavit of David Van Dyke, however, the FDIC demonstrates that Knutson was given credit in Mach's calculation for the noted account activity. Affidavit of David A. Van Dyke par. 3 and Exh. 1. Accordingly, no issue of fact is raised by the alleged inconsistency in the Bank's records.

Defendants also argue that the deposition testimony of

Bruce Holmgren and Richard Farrell, which reveals Dennis Albertson's proclivity to falsify entries in the books and records of the bank, undermines the reliability of the bank's records such that they may not be relied upon as support for the FDIC's motion for summary judgment. The Court finds that this argument represents an attempt by defendants to resurrect their affirmative defense of payment and as such is without merit.

Based on the foregoing, the Court will grant the FDIC's motion for summary judgment.

II. ***Motion to Dismiss Counterclaims***

In all eight of these actions, defendants assert nearly indentical counterclaims against the bank. All defendants assert that the bank is liable for damages under theories of breach of contract, negligence, promissory estoppel and misrepresentation. Defendants John Schilling and Grant Knutson assert these same counterclaims against the FDIC, apparently based on the alleged wrongdoing of the bank. Defendant Peter Kasal asserts a counterclaim against the bank pursuant to Minn. Stat. § 549.21 and a counterclaim against the bank for punitive damages. Likewise, defendants Peter Kasal and George Ruzicka seek relief against the FDIC under Minn. Stat. § 549.21. The FDIC now moves to dismiss all defendants' counterclaims against the bank and the FDIC pursuant to Fed.R.Civ.P. 12(b) (6) for failure to state a claim upon which relief can be granted.

In reviewing a motion to dismiss for failure to state a claim the Court presumes all factual allegations to be true and all reasonable inferences from those allegations are construed in favor of the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Palmer v. Tracor, Inc.*, 856 F.2d 1131, 1132 (8th Cir. 1988) The appropriate inquiry is not whether plaintiff will ultimately prevail but whether he will be allowed to introduce evidence to support his claims. *Scheuer*, 416 U.S. at 236. Because dismissal on the pleadings is an extreme remedy it is not favored by the courts and is employed only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355

U.S. 41, 45-46 (1957) (footnote omitted). *Robinson v. MFA Mutual Insurance Co.*, 629 F.2d 497, 500 (8th Cir. 1980) *See also Palmer*, 856 F.2d at 1132.

A. ***Counterclaims Against the FDIC***

Pursuant to statutory authority and case law, the FDIC may often act simultaneously in two separate legal capacities with respect to a failed bank: one as a "receiver" when it sells the bank's assets, and another as a "corporation" when it purchases assets from the receiver which are unacceptable to the purchasing bank. *See* U.S.C. § 1823(c) (2); *FDIC v. La Rambla Shopping Center, Inc.*, 791 F.2d 215 (1st Cir. 1986); *FDIC v. Lauterbach*, 626 F.2d 1327, 1330 n.4 (7th Cir. 1980); *Batsakis v. FDIC*, 670 F.Supp. 749, 752 (W.D.Mich. 1987) When the FDIC in its corporate capacity purchases unacceptable assets from the FDIC as receiver, the FDIC-corporate is not deemed a successor in interest to the failed bank, nor does it assume the liabilities of the receivership. *Batsakis*, 670 F.Supp. at 752-53; *FDIC v. Vestring*, 620 F.Supp. 1271, 1274 (D.Kan. 1985); *FDIC v. First Mortgage Investors*, 485 F.Supp. 445, 452 (E.D.Wis. 1980). The FDIC-corporate cannot be held liable for any contracts entered into, or fraud perpetrated by, agents of the bank. *Batsakis*, 670 F.Supp. at 753; *Vestring*, 620 F.Supp. at 1274. Rather, any claims arising from actions of a failed bank and its agents are enforceable only against the FDIC-receiver. *FDIC v. Condit*, 861 F.2d 853 (5th Cir. 1988); *Batsakis*, 670 F.Supp. at 753; *FDIC v. Vogel*, 437 F.Supp. 660, 665 (E.D.Wis. 1977). The notes at issue in these cases were purchased by the FDIC in its corporate capacity, and it is the FDIC-corporate which now seeks to collect on these notes through the instant lawsuits. Accordingly, the counterclaims asserted by defendants Schilling and Knutson against the FDIC which are based on the alleged wrongdoing of the bank must be dimissed.

Defendants Peter Kasal and George Ruzicka assert a counterclaim against the FDIC for violation of Minn. Stat. §

549.21.[5] Defendants allege that prior to the initiation of these lawsuits and the intervention of the FDIC, defendants met with examiners from the FDIC who verified that substantial payments were made on the notes at issue which payments were never credited to the balance of defendants' debts. Defendants contend that in light of the FDIC's recognition of these payments, the effort of the FDIC to collect the full amount of the notes constitutes bad faith entitling defendants to compensation under Minn. Stat. § 549.21.

Based on the foregoing analysis of defendants' defense of payment and the Court's decision to grant summary judgment in favor of the FDIC, the Court finds defendants' counterclaim under Minn. Stat. § 549.21 to be without merit. As explained above, the Court finds that any alleged payments on defendants' obligations do not constitute a valid defense to the FDIC's collection of the full amount of the notes. Thus the FDIC cannot be held to have acted in bad faith in seeking to recover the full amount of the notes in the face of knowledge of purported payments. Accordingly, the Court will dismiss the counterclaim of defendants Peter Kasal and George Ruzikca brought pursuant to Minn. Stat. § 549.21.

B. Counterclaims Against the Bank

Based on the foregoing analysis, the Court will grant summary judgment in favor of the FDIC on all its claims. The Court will dismiss defendants' counterclaims against the FDIC. Therefore, the only remaining claims are defendants' counterclaims against the bank. These

---

[5]Minn. Stat. § 549.21, subd. 2 provides in relevant part:

> Upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court.

counterclaims, however, are based entirely on state law. Accordingly, the Court lacks jurisdiction to entertain defendants' counterclaims against the bank and those claims will be dismissed. *See La Rambla*, 791 F.2d at 220-21. Such dimissal, however, will be without prejudice, and defendants are free to pursue their claims, if any, against the bank or the FDIC as receiver in state court.

Based on the foregoing, and upon all the files, records, proceedings and arguments of counsel,

IT IS ORDERED that:

1. the FDIC's motion for summary judgment is granted;
2. the FDIC's motion to dismiss defendants' counterclaims against the FDIC is granted; and
3. the FDIC's motion to dismiss defendants' counterclaims against the bank is granted without prejudice to defendants' pursuing such claims against the banks or the FDIC as receiver in state court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Judge Harry H. MacLaughlin
United States District Court

DATED: July 13, 1989

United States Court Of Appeals
For The Eighth Circuit

No. 89-5491MN

Federal Deposit Insurance
Corporation, in its Corporate
Capacity,
Appellee,
vs.

Stanley Kasal, Oather
Martin, Jr., George Ruzicka,
d/b/a Ruzicka Brothers,
Oather Martin, Sr., and
Francis Kasal,
Appellants.

Appeal from the United States District Court for the District of Minnesota. Fourth Division

Submitted: June 14, 1990
Filed: August 31, 1990

Before LAY, Chief Judge, HEANEY and TIMBERS*, Circuit Judges.

---

*Of the Second Circuit, sitting by designation.

TIMBERS, *Circuit Judge:*

Appellants Stanley Kasal, Oather Martin, Jr., George Ruzicka, d/b/a Ruzicka Brothers, Oather Martin, Sr., and Francix Kasal ("appellants") appeal from an order entered July 14, 1989, in the District of Minnesota, Harry H. MacLaughlin, *District Judge,* granting the motions of appellee Federal Deposit Insurance Corporation ("FDIC") for summary judgment, to dismiss with prejudice appellants' counterclaims against the FDIC in its corporate capacity ("FDIC-corporate"), and to dismiss without prejudice appellants' counterclaims against the Citizens State Bank of Gibbon, Minnesota ("Bank") and against the FDIC in its capacity as receiver of the failed Bank ("FDIC-receiver").

On appeal, appellants claim that the district court erred in holding (1) that 12 U.S.C. § 1823(e) (1988) and federal common law, *see D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942), precluded their defense of payment; (2) that there was no genuine issue of material fact precluding summary judgment; and (3) that appellants' counterclaims should be dismissed for lack of subject matter jurisdiction.

For the reasons which follow, we affirm the order of the district court on teh first and second claims stated above. With respect to the third claim, we hold that a statutory amendment provides subject matter jurisdiction over appellants' counterclaims against the FDIC-receiver. Addressing those claims, we dismiss them with prejudice.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal. Since this is an appeal from a summary judgment in favor of the FDIC, we review the facts in the light most favorable to appellants.

This appeal arises from eight related actions filed by the FDIC seeking to collect on promissory notes executed by appellants in favor of the Bank. The FDIC, in its corporate capacity, sought recovery after each appellant defaulted on his obligation on the notes.

Appellant Francis Kasal ("Kasal") was a customer and

depositor of the Bank from 1965 to 1986. At one time he was the largest single customer of the Bank, entering into scores of financial transactions involving millions of dollars. He also was involved in several personal financial transactions with Dennis Albertson, the president of the bank.

Over the course of Kasal's dealings with the Bank, a pattern developed whereby the Bank would issue general debits against Kasal's checking account and would apply the proceeds to his notes. Albertson repeatedly assured Kasal that the debits on his accounts had been applied properly to his obligations. Further, Kasal made most of his deposits directly through Albertson and relied on Albertson to deposit the funds in his accounts.

During 1983, 1984, and 1985, Albertson repeatedly informed Kasal that he was over the Bank's lending limit. Albertson also told him that the Bank would lend additional amounts if he could obtain the signatures of friends or relatives on additional notes. Thereafter, with the advice and encouragement of Albertson, Kasal obtained the signatures on various notes of appellants Stanley Kasal (his cousin), Oather Martin, Sr. (father-in-law), Oather Martin, Jr. (brother-in-law), and George Ruzicka (uncle). In each instance, appellants were told by Albertson and Kasal that they would not be required to repay the loan, but that the Bank would look solely to Francis Kasal for repayment. Certain of the appellants were induced similarly to execute notes on behalf of Albertson. No appellant received the proceeds of these loans, which totaled over $500,000.

Kasal directed Albertson to apply money toward appellants' obligations to the Bank on numerous occasions between 1983 and 1986. Kasal developed suspicions about the handling of his finances in 1986 when he discovered that many of the notes that he and the other appellants had signed with the Bank were not being paid in accordance with his directives. In late 1986, Kasal contacted the Minnesota State Banking Commissioner and the FDIC, requesting an examination of his accounts with the Bank. In May and June of 1987, Kasal met with FDIC examiners and provided them with information. Ultimately, Albertson

was convicted of bank fraud, in part for pocketing the funds given him by Kasal. He currently is serving time in a federal prison.

The Bank filed separate lawsuits in the state court against appellants in July, 1987, seeking to collect on the notes executed in favor of the Bank. Each appellant had defaulted on his obligation on the note. Appellants interposed answers alleging the affirmative defenses of lack of consideration, accord and satisfaction or payment, fraud in the inducement, and fraud in the factum. They also asserted counterclaims alleging breach of contract, negligence, promissory estoppel, and misrepresentation.

On March 18, 1988, the Minnesota State Commerce Commissioner determined that the Bank was insolvent, orderd the Bank closed, and appointed the FDIC as receiver. The FDIC-receiver sold certain assets of the Bank, including the notes here involved, to the FDIC-corporate. The FDIC-corporate then moved to be substituted for the Bank as the real party in interest in the state court cases. These motions were denied. The state court, however, did permit the FDIC to intervene as a party plaintiff. The FDIC then removed the cases to the federal district court pursuant to 12 U.S.C. § 1819 (1988) and 28 U.S.C. § 1446 (1988).

The FDIC's complaint alleged that appellants executed various notes in favor of the bank which the FDIC now owns and that appellants defaulted on the notes. The FDIC sought to collect on the notes and to foreclose on any property given as security for the notes. In response, appellants asserted the affirmative defenses and counterclaims they had raised in the state court. The FDIC moved for summary judgment on the notes executed by appellants and sought dismissal of the counterclaims asserted by appellants against the Bank and the FDIC.

In an order entered July 14, 1989, the district court granted the FDIC's motions for summary judgment, holding that appellants' defense of payment was barred by *D'Oench, Duhme* and 12 U.S.C. § 1823(e). The court also dismissed with prejudice appellants' counterclaims against the FDIC-corporate, holding that the FDIC-corporate was not

answerable for the acts of the Bank. Finally, the court dismissed without prejudice for lack of subject matter jurisdiction appellants' counterclaims against the Bank and against the FDIC-receiver.

This appeal followed.

II.

Our standard of review of the district court's grant of summary judgment is well-settled: we apply the same standard as that applied by the district court. *Meyer v. Barnes*, 867 F.2d 464, 466 (8th Cir.), *cert. denied*, 110 S. Ct. 86 (1989). We therefore will affirm the district court's grant of summary judgment only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)); *see also FDIC v. Cardinal Oil Well Servicing Co.*, 837 F2d 1369, 1371 (5th Cir. 1988) ("Typically, suits on promissory notes provide fit grist for the summary judgment mill.")

When considering a summary judgment motion, a court must determine whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Libery Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court's role is not to weigh the evidence, but to determine whether there is a genuine factual conflict. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). In making this determination, the court must view the evidence in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences that can be drawn from the facts. *Id.*

III.

With the foregoing in mind, we turn first to the affirmative defenses asserted by appellants with respect to their liability on the notes. At the outset, we observe that appellants have dropped their defenses of failure of consideration, fraud in the inducement, and fraud in the factum. Those defenses were waived for purposes of this appeal.

(A)

Appellants now contend only that the FDIC cannot recover the full amount of the notes because Kasal made numerous payments, pursuant to their secret unwritten side agreements, intended to be applied to appellants' indebtedness, that were later misappropriated by Albertson. We disagree. We hold that § 1823(e) bars appellants from raising any aspect of their secret side agreements with the Bank as a defense to the FDIC's claims on the notes.

The controlling statute here involved, § 1823(e), provides:

> "No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it . . . shall be valid against the [FDIC] unless such agreement — (1) is in writing, (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, comtemporaneously with the acquisition of the asset by the depository institution, (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) has been, continuously, from the time of its execution, an official record of the depository institution."

We recently addressed the reach of § 1823(e) in *FDIC v. Krause*, No. 89-1932 (8th Cir. June 4, 1990), a case with facts similar to the instant appeal. In *Krause*, the debtors argued that their debts had been paid and settled pursuant to a settlement agreement with the bank president. The agreement was not reflected in the minutes of the board of directors or loan committee. We affirmed the grant of summary judgment in favor of the FDIC, holding that the debtors could not rely in any part on their agreement with the bank president because that agreement failed to comply with the requirements of § 1823(e).

In the instant case, as in *Krause*, appellants made secret unwritten side agreements that tend "to diminish or defeat

the interest" of the FDIC. They now complain that Albertson failed to perform those secret side agreements, because he did not deposit in the Bank the payments allegedly given him by Kasal. Yet appellants do not, and could not, assert that their agreements with Albertson met the strict terms of § 1823(e). *Langley v. FDIC*, 484 U.S. 86, 95 (1987) ("Congress opted for the certainty" of the "categorical recording scheme" of § 1823(e)). Their agreements were not in writing, never were approved by the Bank's board of directors or loan committee, and never were maintained as part of the Bank's records. We therefore hold that appellants' defense of payment, based on secret unwritten side agreements, is barred by § 1823(e). Appellants may not rely in any part on those agreements, because those agreements tend "to diminish or defeat the interest" of the FDIC and do not meet the strict categorical terms of § 1823(e).

The policy behind § 1823(e) supports our conclusion that the FDIC should not be bound by these transactions. In *Langley, supra*, 484 U.S. at 91-92, the Supreme Court explained that § 1823(e) serves two purposes: "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets" and to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." To allow appellants the benefit of the alleged unapplied payments would undermine the statute's purpose of "allow[ing] federal and state bank examiners to rely on a bank's records". *Id.* at 91; *see also FDIC v. La Rambla Shopping Center, Inc.*, 791 F.2d 215, 219 (1st Cir. 1986) (without protection of § 1823(e) FDIC would be subject to various, and varying, state laws.)

Moreover, when an insured bank closes, the FDIC must determine whether to liquidate the failed bank or to provide financing for a purchase and assumption transaction. *Langley, supra*, 484 U.S. at 91. This evaluation must be made "'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.'" *Id.* (citation

omitted). The Court in *Langley* recognized that the FDIC would be unable to perform this evaluation if seemingly unqualified notes were subject to undisclosed conditions. *Id.* at 92. Accordingly, appellants' defense of payment, based on their secret unwritten side agreements, is contrary to the purposes of § 1823(e).

(B)

Our holding — that § 1823(e) bars appellants from raising any aspect of their secret unwritten side agreements with the Bank as a defense to the FDIC's claims on the notes — is consistent with the common law doctrine of *D'Oench, Duhme,* which provides a viable independent basis for invalidating collateral agreements against the FDIC even after the enactment of § 1823(e). *D'Oench, Duhme, supra,* 315 U.S. at 456-62; *FDIC v. Vestring,* 620 F. Supp. 1271, 1273-74 (D. Kan. 1985). In *D'Oench, Duhme,* the Supreme Court held that an accommodation maker was estopped from raising defenses of failure of consideration and an understanding with the bank that the note would not be enforced. *D'Oench, Duhme, supra,* 315 U.S. at 456-62. The Court held that "[i]t would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled." *Id.* at 460; *see also Firstsouth, F.A. v. Aqua Construction, Inc., 858 F.2d 441, 443 (8th Cir. 1988) (D'Oench, Duhme* estops debtors from asserting secret side agreements regarding the instruments in question); *FDIC v. R-C Marketing and Leasing, Inc.,* 714 F. Supp. 1535, 1543 (D. Minn. 1989) (*D'Oench, Duhme* barred makers from alleging that they relied on oral representations that they would not be liable on instruments). The common law doctrine of *D'Oench, Duhme* provides a separate and independent ground for holding that appellants may not rely on their secret unwritten side agreements.

Appellants contend that their defense of payment arises from the very same agreements that the FDIC is attempting to enforce. In support of this contention, appellants rely on

Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305 (M.D. Tenn. 1978). That reliance is misplaced. In *Riverside Park*, the plaintiffs commenced an action seeking to enjoin the FDIC from foreclosing under a deed of trust on real property. The FDIC acquired the deed of trust and the note it secured from the FDIC as receiver of a failed bank. The plaintiffs argued, and the court agreed, that a foreclosure sale of the property should be enjoined because they asserted a breach of contract counterclaim, based on the lender's pre-closing conduct, which met or exceeded the FDIC's claim on the note. The court specifically rejected the FDIC's argument that § 1823(e) barred the counterclaim, since it would have the effect of diminishing the FDIC's interest in the deed of trust.

The crucial factor in *Riverside Park* was that the loan agreement in that case was a written agreement expressly incorporated by reference in the deed of trust on which the FDIC sought to foreclose. The loan agreement therefore was part of the same agreement that the FDIC sought to enforce, *id.* at 313, and an examination of the face of the deed of trust should have put the FDIC on notice as to the existence of the loan agreement. In the instant case, by contrast, appellants' payment argument cannot be established without reference to their secret unwritten arrangements with Albertson, which were not recorded on the books of the Bank and of which the FDIC had no knowledge. Section 1823(e) bars reliance on such arrangements. *Id.* (quoting *FDIC v. Vogel*, 437 F. Supp. 660, 663 (E.D. Wis. 1977)) (§ 1823(e) "operates to insure that the FDIC . . . can rely on the [closed] bank's records and will not be risking an impairment of the assets through an agreement not contained in the bank's records"). Indeed, the court in *Riverside Park* was careful to distinguish the situation before it from the typical "collateral or secret agreement" from which the FDIC is protected by § 1823(e). *Id.* at 313.

Similarly, the district court decisions in *FDIC v. Kuang Hsung Chuang*, 690 F. Supp. 192 (S.D.N.Y. 1988); *FDIC v. Manatt, 688 F. Supp. 1327 (E.D. Ark. 1988);* and *FDIC v. Wright*, 684 F. Supp. 536 (N.D. Ill. 1988), are distinguishable

from the instant case. In *Chuang* and *Manatt*, the banks' records reflected the payments made by the debtors, and in *Wright* the FDIC offered no evidence to counter the debtor's claim that she paid the note in full. In each case the FDIC was or should have been on notice as to the payments. In the instant case, by contrast, the FDIC had no knowledge of payments made by any of the appellants. *Cf. Langley, supra,* 484 U.S. at 91 (one purpose of § 1823(e) is to allow "bank examiners to rely on a bank's records"). In any event, to the extent that those district court decisions conflict with our holding that appellants may not raise any aspect of their secret unwritten side agreements against the FDIC, we reject those decisions as contrary to the language and purposes of § 1823(e) and *D'Oench, Duhme.*

(B)

As a final consideration, we address appellants' contention that several commentators have recently criticized the broad reach of § 1823(e) and *D'Oench, Duhme,* and teh protection they afford the FDIC. *E.g.,* Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail,* 62 S. Cal. L. Rev. 253, 318-19 (1988) ("courts have lost sight of the equitable roots of . . . the *D'Oench, Duhme* doctrine . . . and have expanded greatly the protection afforded the bank insurer")' *Langley v. FDIC: FDIC Superpowers — A License to Commit Fraud,* 1989 Ann. Rev. Banking L. 559, 580 (describing *Langley* as "endors[ing] a policy redistributing the cost of bank failures from the taxpayers to individuals whose liability may be signifíciant"). While we agree that the result in the instant case may appear harsh or inequitable to some, we nevertheless are constrained by both the statute and federal common law to reject appellants' defense of payment, since that defense is based upon secret unwritten side agreements never entered in the records of the Bank.

We hold that § 1823(e) and the common law doctrine of *D'Oench, Duhme* bar appellants from raising any aspect fo their secret unwritten side agreements with the Bank as a defense to the FDIC's claims on the notes.

IV.

We turn next to the contention of appellant Ruzicka that he has offered evidence directly in conflict with the evidence offered by the FDIC, and that the district court therefore erred in granting summary judgment. Ruzicka contends that the amount of his debt to the Bank is in question, and that this dispute raises a genuine issue of material fact. We disagree.

There is no genuine issue as to Ruzicka's liability. Ruzicka maintains that a loan payment of $45,945.95 was not properly credited against his loan. He simply misstates the record. The FDIC submitted an affidavit which indicates that Bank records indeed credited that amount to his account. Ruzicka submitted no evidence to the contrary.

We hold that there is no genuine issue of material fact concerning that amount of Ruzicka's debt to the Bank to defeat the grant of summary judgment.

V.

This brings us to appellants' final argument: that the district court erred in dismissing their counterclaims against the Bank and against the FDIC-receiver. (Appellants do not appeal from the court's decision to dismiss with prejudice their counterclaims against the FDIC-corporate). Appellants filed counterclaims alleging breach of contract, negligence, promissory estoppel, and misrepresentation, all arising from their secret unwritten side agreements with Albertson and Albertson's subsequent misappropriation of Kasal's loan payments. The district court dismissed these counterclaims for lack of subject matter jurisdiction, without prejudice to asserting the claims in the state court.

The state court properly based its ruling that it lacked subject matter jurisdiction on 12 U.S.C. § 1819(Fourth) (1982), as that statute read at the time of the decision. Under that statute, the district courts had no jurisdiction over suits, such as the instant one, "to which the [FDIC] is a party in its capacity as receiver of a State bank and which involve[] only the rights or obligations of depositors,

creditors, [or] stockholders . . . ." *Id.*

Section 1819(Fourth) of the Federal Deposit Insurance Act has since been amended. 12 U.S.C. § 1819, as amended by Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 209(3) and (4), 103 Stat. 183, 216-17 (1989). In view of FIRREA, we need not reach the issue of the district court's dimissal of the counterclaims for lack of subject matter jurisdiction. Under amended § 1819(Fourth), the federal courts now have jurisdiction to hear counterclaims against the FDIC as receiver of a failed bank.

Although FIRREA became law after the district court in the instant case rendered its decision, we will consider the effect of the amendments and apply the law as it now exists. Generally a court must apply the law in effect at the time it renders its decision unless to do so would be unjust or contrary to statutory or legislative direction. *See Bradley v. School Board,* 416 U.S. 696, 711 (1974); *Thurman v. FDIC,* 889 F.2d 1441, 1444 (5th Cir. 1989) (applying FIRREA's § 1819 amendments to cases pending on appeal when FIRREA became law); *Triland Holdings & Co. v. Sunbelt Service Corp.,* 884 F.2d 205, 207 (5th Cir. 1989) (same).

Normally, at this point we would remand the case so that the district court could rule on the merits, but we need not do so where, as here, "the record permits only one resolution of the . . . issue." *Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982).

Appellants' counterclaims against the FDIC-receiver and against the Bank are barred by § 1823(e), which also was amended by FIRREA after the district court handed down its decision. 12 U.S.C. § 1823(e), as amended by FIRREA, Pub. L. No. 101-73, § 217(4) (1989); *see also Astrup v. Midwest Federal Savings Bank,* 886 F.2d 1057, 1059 (8th Cir. 1989) (common law doctrine of *D'Oench, Duhme* also bars counterclaims against the FDIC as receiver). *Beighley v. FDIC,* 868 F.2d 776, 784 (5th Cir. 1989) (*D'Oench, Duhme* bars defenses and affirmative claims against the FDIC as receiver). In no event can appellants make good their counterclaims against the FDIC-receiver or against the

Bank, since those claims are based on their secret unwritten side agreements with Albertson. To permit appellants to pursue their counterclaims would "diminish or defeat" the interest of the FDIC in its receivership capacity in the notes, and § 1823(e) bars that.

We hold that under amended § 1819(Fourth) appellants' counterclaims against the Bank and against the FDIC-receiver may now be heard in the federal court. We also hold that appellants' counterclaims, based on their secret unwritten side agreements with Albertson, are barred by amended § 1823(e). We therefore dismiss appellants' counterclaims with prejudice.

VI.

To summarize:

We hold that the district court properly granted appellee's motions for summary judgment, since § 1823(e) and the common law doctrine of *D'Oench, Duhme* bar appellants from raising any aspect of their secret unwritten side agreements with the Bank as a defense to the FDIC's claims on the notes. We also hold that there is no genuine issue of material fact concerning the amount of Ruzicka's debt to the Bank to defeat the grant of summary judgment. Finally, we hold that appellants' counterclaims against the Bank and against the FDIC-receiver may not be heard in the federal court, and we dismiss those counterclaims with prejudice.

Affirmed.

HEANEY, Senior Circuit Judge, dissenting.

There are two issues in this case: (1) whether the FDIC is bound by an unrecorded agreement between Dennis Albertson, the president of the Citizens State Bank of Gibbon, Minnesota, and Francis Kasal that the bank would look to Francis Kasal for payment of promissory notes signed by Bruce Kasal, Stanley Kasal, John D. Schilling,

Roger Schaufler, George Ruzicka, and Grant G. Knutson;[1] and (2) whether Francis Kasal should be entitled to prove the true balance on the notes.

I agree with the majority that the FDIC is not bound by the secret agreement between Albertson, Francis Kasal, and borrowers other than Francis Kasal, and that each borrower is obligated to pay the amount due on the note signed by him. Furthermore, Francis Kasal is obligated on the entire amount due.

I cannot, however, agree that Francis Kasal is not entitled to prove the true balance outstanding. He submitted an affidavit dated February 26, 1989 in which he stated that on three occasions, June 10, 1982, June 22, 1982, and August 20, 1983, he signed promissory notes to the bank totaling $160,000. Jt. App. at 468. No deposits were made to his accounts for the sums involved, and no credits were given on earlier notes. *Id.* Moreover, he received no cash from the bank. *Id.* Kasal's affidavit further recited that on two occasions, July 5, 1982 and December 20, 1982, a total of $95,000 was taken from Francis Kasal's account without his consent. *Id.* The affidavit also recounts that on March 24, 1983, Kasal gave Albertson, the president of the bank, $90,000 to deposit into Kasal's account. *Id.* No such deposit was made. The affidavit finally recounts that on several occasions from January 1981 to October 1985 Kasal's account was debited by approximately $180,000 without corresponding credits being given for the notes payable or

[1]The table below is taken from the February 14, 1989 affidavit of Patrick R. Mach, an FDIC examiner. Jt. App. at 482-83. It shows the balance due on each note as of that date.

	Principal	Interest	Total
Bruce Kasal	108,936	55,839	164,775
Stanley Kasal	28,497	16,313	44,810
John D. Schilling	50,000	26,390	76,390
Roger Schaufler	25,000	12,708	37,708
George Ruzicka	221,452	64,253	285,705
Grant G. Knutson	50,000	25,562	75,562
Francis Kasal	501,473	241,109	742,582

We note the dismissal of appellants Schilling and Knutson on June 6, 1990 and July 19, 1990, respectively, both on their own motions.

without any other explanation as to why the accounts were debited. *Id.* at 469. Kasal's theory as to these transactions was that Albertson had appropriated in excess of $500,000 from his account through the transactions noted above and that the FDIC should credit Kasal for these sums against the notes signed by him and the other debtors.[2]

In my view, Francis Kasal is entitled to prove at trial that Albertson had in fact misappropriated all or a part of the $500,000 and that these sums should have been credited to the notes signed by him and the other borrowers. It follows that the district court erred in granting FDIC's motion for summary judgment. Under my view, the FDIC would remain free to collect the balance due from Francis Kasal or the others who had signed the notes, but in no event should it be permitted to recover more than the amount actually due. A bank customer should not be expected to protect the FDIC against an officer or employee who misappropriates that customer's funds.

I have carefully read each of the cases cited by the majority in its opinion and do not find authority in any of them for the proposition that Francis Kasal is not entitled to prove the true balance of his debt owed.

Certainly, neither section 1823(e) or *Langley v. Federal Deposit Insurance Corp.,* 484 U.S. 86 (1987), supports the majority's view. Section 1823(e) provides as follows:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or it loan committee, which

[2] Albertson was indicted and convicted on several counts of misappropriation of bank funds. Some of the counts for which he was convicted were related to the transactions enumerated above.

approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

This section, as the majority notes, permits the FDIC to recover the full balance due on the notes signed by Francis Kasal and his friends and relatives because the side agreements reached did not meet writing, approval, and filing requirements if 12 U.S.C. § 1823(e). Thus, each person who signed a note is liable for the balance due on the note signed, and Francis Kasal is jointly and severally liable for the balance due on all the notes signed. The section, however, does not place the risk of loss on a bank customer where a director, officer, or employee of the bank has misappropriated funds from that customer.

The Supreme Court in *Langley* held that section 1823(e) has two purposes: (1) to allow bank examiners to rely on a bank's record in evaluating the worth of a bank's assets, and (2) to require agreements to be properly recorded so that terms other than those expressed in an agreement cannot be fraudulently inserted in an agreement when a bank heads for failure. *Id.* at 91-92. The *Langley* Court reasoned:

> Certainly one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in D'Oench, Duhme) or of the truthfulness of a warranted fact.

Id. at 93. The thrust of *Langley* is that only those who participate in the secret scheme or arrangement are to be prejudiced. Nothing in *Langley* requires that bank customers, rather than the bank or the FDIC, should bear the loss if a bank officer or employee misappropriates funds from a customer.

It follows that where a bank customer has neither authorized, ratified, nor participated in the fraudulent action resulting in the loss, the FDIC, rather than the depositor, should bear that loss. Here, no relationship

between Albertson's misappropriation of funds and the side agreements exists.[3] One does not need to prove the existence of the side agreements to prove that payments were made. It is a perversion of justice to hold the borrowers responsible for funds misappropriated by a bank officer, funds which should have been applied to the payment of the notes.[4]

In *D'Oench, Duhme & Co. v. FDIC,* 315 U.S. 447 (1942), the debtor alleged that the note in question was given with the understanding that no suit would be brought thereon. The Court rejected this defense. I agree that the defense raised by the debtors other than Francis Kasal should be

---

[3]Section 1823(e) should not bar fraud in the inducement as a defense, and *a fortiori*, section 1823(e) should not necessarily bar misappropriation as a defense. The plain meaning and legislative history of section 1823(e) permit such a reading. *See* Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail,* 62 So. Cal. L. Rev. 253, 308-311 (1988). Allowing these defenses will not open the floodgates of litigation because the equitable principles of *D'Oench, Duhme* still apply. *See id.* at 310. Thus, any bank customer who lent himself or herself to a scheme that as a result deceived the FDIC would be liable to the full amount of the debt as reflected in the bank records. *Id.* In this case, the defendants' original side agreements should be barred, but the defense arising from Albertson's misappropriation, in which none of the defendants participated, should not be barred.

[4]12 U.S.C. § 1822(d) provides:

> **(d) Witholding payments to meet liability to depository institution**
>
> The Corporation may withhold payment of such portion of the insured deposit of any depositor in a depository institution in default as may be required to provide for the payment of any liability of such depositor to the depository institution in default or its receiver, which is not offset against a claim due from such depository institution, pending the determination and payment of such liability by such depositor or any other person liable therefor.

Under this section, it was appropriate for the FDIC to offset any funds held by the bank on deposit for Francis Kasal against money owed by Kasal to the bank. The problem here is that the president of the bank misappropriated funds from Kasal's account. To the extent that Kasal can prove that funds from his account were misappropriated by a director, officer, or employee of the bank, he should be permitted an offset against the amount owed by him.

reversed here for the same reason: that Kasal was alone responsible for repayment of these debts is not a valid defense. The debtor in *D'Oench, Duhme*, however, did not assert that he had actually paid the note in question.

In *FDIC v. Kuang Hsung Chuang*, 690 F. Supp. 192 (S.D.N.Y. 1988), the court considered a number of transactions and rejected defenses based on fraud, misrepresentation, conflicts of interest, and collateral unwritten and unannounced agreements. On the other hand, it held that if the debtor could prove actual payment, that would constitute a defense. It stated:

> The T & C Notes and Mortgage Note
>
> As stated earlier, defendants have the burden of establishing their defense with evidence sufficient for a reasonable trier of fact to return a verdict in their favor. Defendants admit that the Note and Mortgage Note were duly executed, but argue tha the documents provided in Ms. Teng's Supplemental Affidavit raise genuine issues of material fact concerning repayment of the loans. These documents, described in detail above, are generally inconclusive, though they do establish that the Bank credited T & C for "repayment" of something.
>
> Though the documents are confusing and may not in the final analysis prove anything, this Court believes summary judgment is not warranted on the question of the amount owing . . .

Id. at 199.

It took the same position in respect to an unrelated guaranty by the debtor on certain notes. It stated:

> Ms. Teng does argue, however, that the monies owed to the Bank on these notes have been repaid, and that the obligations on the Unlimited Guaranty would thus be zero. While her premise is correct, she has not conclusively established how much was in fact borrowed or repaid, as discussed above. Consequently, plaintiff's motion for summary judgment is granted on the liability question, but denied on the question of the

> amount presently owing. As noted above, a Magistrate will conduct an inquest to determine the amount due, and Teng's estate will be liable for that amount.

Id.[5]

In *FDIC v. Wright,* 684 F. Supp. 536 (N.D. Ill. 1988), the FDIC brought an action to recover monies due and owing on four promissory notes. The FDIC moved for summary judgment. In contesting the motion on two of the notes, defendant maintained that both notes had been paid. She, however, had evidentiary support for her claims of payment on only one of the notes.

In regards to the claim of payment lacking evidentiary support, the court stated that "athough Defendant contests that FDIC's motion for summary judgment by claiming that she has made partial payment on the relevant note, she provides no evidentiary support for the assertion. She bears the burden of persuasion for this defense." *Id.* at 540 (citing *State Bank of Moline v. Young,* 149 Ill. App. 3d 460, 500 N.E.2d 732 (1986)). The FDIC's motion for summary judgment was granted on this account. *Id.*

Regarding the payment that was supported by evidence, the court stated:

> Defendant contests summary judgment on the note on the ground that she has paid it in full. *For this count, unlike the previous one, she supports this argument with her sworn affidavit to that effect.* Nevertheless, the FDIC maintains that it is entitled to summary judgment on this count because Defendant concedes that she has no documentary evidence to support her argument and, in Illinois, such evidence is required to

---

[5]The majority distinguishes *Chuang* from the instant case stating that in *Chuang* the bank's records reflected the payments made by the debtors. As I read the record in *Chuang* regarding the T & C note, it is the same as it is here. The debtor on the T & C note established certain debits to his account through the use of personal bank records rather than official bank records and was permitted both to prove the purpose of these debits and to show that they were intended to be repayment on the note in question. *Chuang,* 690 F.Supp. at 199. This is all that Francis Kasal asks here.

satisfy her preponderance burden.

. . .

> In this case, the FDIC has pointed to no testimony at all that conflicts with Defendant's claim that she made full payment on the note. Nor has it pointed to any documentary evidence to that effect. Accordingly, a genuine issue as to a material fact exists, and summary judgment must be denied.

Id. (emphasis added). The court, relying on the defense of payment, denied FDIC's motion for summary judgment on this count. *Id.*

In FDIC v. Manatt, 688 F. Supp. 1327 (E.D. Ark. 1988), prior to the closing of the bank, the defendant, pursuant to a written agreement with the bank, conveyed certain items of collateral to the bank that were liquidated and sold either by the bank or the FDIC. The proceeds received were only applied in partial satisfaction of defendant's indebtedness. However, the defendant claimed that this agreement was to satisfy completely his indebtedness to the bank. The court hedl that nowhere in the deed was it suggested that all of defendant's debt was to be forgiven. The court found that defendant's agreement with the bank for liquidation of collateral in satisfaction of the debt was not made contemporaneously with the bank's acquisition of the asset and therefore was invalid. 12 U.S.C. § 1823(e) (2). As such, this "side" agreement was not enforceable against the FDIC. However, the FDIC did give defendant credit for the amount realized from the sale of his property.

At oral argument, FDIC cited, *FDIC v. Krause,* 904 F.2d 463 (8th Cir. 1990), in support of its position that section 1823(e) estops the defense of payment. I find no support in that opinion for the proposition that actual payment is not a defense. In *Krause,* the FDIC sought to collect only the difference between the amounts paid pursuant to the loan settlement agreement and the pre-settlement loan balance. Krause was required to pay that difference even though he had a private arrangement with the president of the bank that he would not have to do so. Krause never claimed that

he had paid this difference. It thus seems to me that *Krause* fully supports the view that I urge in this dissent.

There is one final point that should be made. I sense that the FDIC, and perhaps the majority, takes the position tha the unwritten agreement between Kasal, Albertson, and Kasal's friends and relatives with respect to the notes signed by the friends and relatives taints all other transactions, as a matter of law, with the bank. I reject this view. The language and the policy embodied in section 1823(e) are fully satisfied if the signers of the notes and Kasal are all held responsible for the payment of the notes. Simply stated, no reason exists for not giving Francis Kasal full credit for payments made. Since the affidavits establish a genuine dispute, the amount of these payments, if any, must be established at trial rather than on a motion for summary judgment.

To summarize, I do not disagree with the stated holding in this case that section 1823(e) and the common law doctrine of *D'Oench, Duhme & Co.,* bars the debtors from raising the secret unwritten side agreements with the bank as a defense to the FDIC's claim on the notes. I do, however, disagree that section 1823(e) bars defendants from proving the true balance due on the notes. Thus, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT